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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WEST VIRGINIA UNIVERSITY HOSPTIALS, INC.,
Petitioner,

v.

ROBERT CASEY, Governor of the Commonwealth of Pennsylvania, JOHN WHITE, Secretary of the Pennsylvania Department of Public Welfare, and DAVID S. FEINBERG, Director of the Bureau of Policy and Program Development of the Pennsylvania Department of Public Welfare,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

MAY AN AWARD OF "REASONABLE ATTORNEY'S FEES" UNDER 42 U.S.C. § 1988 INCLUDE COMPENSATION FOR EXPERT WITNESSES?

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BRIEF FOR THE RESPONDENTS

JURISDICTION

The Court of Appeals' decision was issued on September 5, 1989. The Court of Appeals denied petitioner's

timely request for a rehearing by order issued October 5, 1989. The petition for certiorari was filed on December 22, 1989 and was granted on February 26, 1990.

Jurisdiction of the Court is pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1988. Proceedings in Vindication of Civil Rights Attorney's Fees

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so for as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to the govern the said courts in the trial and

disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

28 U.S.C. § 1920. Taxation of Costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshall;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title;

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1821. Per Diem and Mileage Generally; Subsistence

* * * *

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

* * * *

STATEMENT OF THE CASE

Congress, in 28 U.S.C. §§ 1920 and 1821, has provided that the prevailing party in a civil action may recover, as part of its costs, witness fees up to $30 per day. The issue in this case is whether Congress intended to change this rule when it provided that the prevailing party in a civil rights action may recover, as part of its costs, "a reasonable attorney's fee." 42 U.S.C. § 1988.[1] Petitioner contends that it is entitled to recover, under 42 U.S.C. § 1988, fees billed by expert witnesses who assisted in the preparation and presentation of the case. The Court of Appeals, relying on the Court's direction in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) concluded that, because expert fees were not mentioned in § 1988, compensation of experts, like other witnesses, was allowed only as costs taxable under 28 U.S.C. §§ 1920 and 1821.

1. In the lawsuit underlying the question before the Court, the petitioner, West Virginia University Hospitals, Inc. (WVUH), prevailed in its challenge that Pennsylvania's system of reimbursing out-of-state providers of Medicaid services, such as petitioner,

---

[1]The statute provides, in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. § 1988.

violated federal statutory and constitutional law (42 U.S.C. § 1396a(a)(13)(A) and the Fourteenth Amendment)[2], and secured an award of attorney's fees under 42 U.S.C. § 1988. Pet App. at B-67 and 68. As prevailing party, petitioner claimed $350,000 in attorney's fees, $104,133 attributable to expert witness fees and costs and $45,867 in disbursements. Pet. App. at C-1. Although respondents did not contest that the experts were well qualified and that their fees were reasonable, they did argue that expert witness fees were not available under § 1988.

---

[2]The Court of Appeals found it unnecessary to rule on petitioner's successful Fourteenth Amendment Equal Protection claim. Pet. App. at A-37 n. 9.

The District Court disagreed with the respondents. The Court acknowledged that Crawford limits expert fees as costs to thirty dollars per day "'absent contract or explicit authority to the contrary' Crawford, 482 U.S. at 445"; Pet. App. at C-2, and conceded that "[t]his language appears all-encompassing." Pet. App. at C-3. Nevertheless, the District Court concluded that "The fact-specific application of the Crawford decision, coupled with the emphatic statements of three Justices regarding the decision's inapplicability to Section 1988, make departing from accepted practice unattractive." Pet. App. at C-4. The District Court, accordingly, awarded all expert fees claimed.

2. The Court of Appeals reversed, ruling that 42 U.S.C. § 1988 "as presently drafted does not authorize expert fee awards in excess of the statutory cap of thirty dollars per day provided in section 1821(b)." Pet. App. at A-48. The Court of Appeals followed Crawford, stating that it "seems to dictate that, even in the case of a fee shifting statute such as section 1988, a court may not award fees in excess of the statutory maximum of thirty dollars a day unless the fee shifting statute expressly makes such an allowance." Pet. App. at A-46. The appeals court noted the Court's "disfavor for '[a]ny argument that a federal court is empowered to exceed the limitations explicitly set out in sections 1920 and

1821 without plain evidence of congressional intent to supersede that section,'" and noted the Court's admonition in Crawford that it "'will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees.'" Pet. App. at A-46.

The Court of Appeals concluded that Missouri v. Jenkins, No. 88-64 (U.S. June 19, 1989), did not alter the holding in Crawford because Jenkins dealt with fees of law clerks and paralegals, which are not regulated by statute as are witness fees. Pet. App. at A-47. Accordingly, "constrained by the language of Crawford", and "defer[ring] to legislative fiat," the Third Circuit "abandon[ed] [its] previous rule" and "limit[ed] expert witness fees to thirty dollars a day." Pet. App. at A-47.

The Court granted certiorari on February 26, 1990.

SUMMARY OF ARGUMENT

By its plain terms, 28 U.S.C. § 1821 permits a prevailing party to recover $30 per day as costs associated with witnesses. The Court in Crawford Fitting Co. v. J.T. Gibbons Inc., 482 U.S. 437 (1987), has applied the limitation to expert witnesses, and has said it will respect the limitations of witness costs in the Fee Act unless a statute or contract explicitly provides otherwise. The "attorney's fees" amendment to 42 U.S.C. § 1988, upon which petitioner relies, does nothing of kind. By its plain terms, it provides only that "reasonable attorney's fees" be allowed to a prevail-

ing plaintiff as part of the costs. There is no mention in the amendment of

costs associated with expert or other witnesses nor is there any mention of expert witness fees in the debates surrounding its passage. Accordingly, 28 U.S.C. § 1821 limits the amount of reimbursement that may be had for expert witness fees because § 1988 does not contain "explicit statutory authority to the contrary." Crawford, 482 U.S. at 439.

Neither the legislative history of the "attorneys fees" amendment to § 1988, the context of its enactment, nor a comparison with other fee shifting statutes suggests that Congress meant "reasonable attorney's fees" to mean more than just that. The amendment was enacted in direct response to the Court's decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), a decision which forbade federal courts to award attorneys

fees as costs, absent statutory authorization. The entire debate concerning the amendment was over whether an attorney's fee award would be manadatory or discretionary and whether different standards would be applied to prevailing plaintiffs as opposed to prevailing plaintiffs. The question of reimbursing the costs of expert witnesses under § 1988 was neither advocated nor debated by Congress while it was debating the feel shifting amendment to § 1988.

In other fee shifting legislation, however, some of it passed about the same time as the amendment to § 1988, Congress made express provision for the shifting of expert fees as well as attorneys fees as a part of recoverable costs. Thus, it appears that Congress understood that expert fees had to be explicitly provided for, it they were to be allowed as costs, and did not assume

that expert fees would automatically be included by the phrase "reasonable attorney's fees."

There is not only no "persuasive evidence", Watt v. Alaska, 451 U.S. 259, 266 (1981), there is no evidence at all that would preclude the application of the plain meaning rule in this case. To read "reasonable attorney's fees" to include expert fees does violence to the plain meaning and wording of the amendment is not necessary to effectuate the statute's purpose. Congress has provided for court appointed experts upon the request of a litigant and for that expert to be paid by the parties in porportion as the court directs and thereafter charged in like manner as other costs. Fed.R. Evid. 706; 28 U.S.C. § 1920(6). Thus, in a properly presented case, the issue of affordability of experts should never arise.

Missouri v. Jenkins, No. 88-64 (U.S., June 19, 1989), does not control because it did not concern reimbursement for expert witnesses but only the rate of reimbursement for paralegals and law clerks who were employees and members of the attorney's staff. Because these employees were not witnesses, 28 U.S.C. § 1821 did not come into play. Crawford, not Jenkins, controls here and requires that the judgment of the Court of Appeals be affirmed.

ARGUMENT

The bare phrase "reasonable attorney's fee" contained in 42 U.S.C. § 1988 cannot be read so expansively as to include fees generated by expert witnesses. To do so would be to distort the plain meaning of the statute, to read into the legislative history more than is there, and to ignore the Court's clear direction in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). In Crawford, the Court held that "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set forth in 28 U.S.C. § 1821 and § 1920." Id. at 445. Congress has simply not placed in 42 U.S.C. § 1988 an explicit statutory

authorization for an award of expert witness fees, and the judgment of the Court of Appeals adhering to the limits of 28 U.S.C. §§1821 and 1920 must consequently be affirmed.

A. THE PLAIN STATUTORY LANGUAGE, INTERPRETED IN CRAWFORD, LIMITS EXPERT WITNESS FEES TO THIRTY DOLLARS PER DAY.

The Court has consistently said that in cases of statutory construction that starting point must be the statutory language itself. United States v. Ron Pair Enterprises, Inc., No. 87-1043 (U.S. Feb. 22, 1989); Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) "[T]he strong presumption [is] that Congress expresses its intent through the language it chooses." Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1989). Where the language of a statute is clear, only the

"most extraordinary showing of contrary intentions" from the legislative history[3] would justify altering the statute's plain language. Garcia v. United States, 469 U.S. 70, 75 (1984).[4]

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[3]The legislative history of the fee shifting amendment to § 1988 is conveniently collected in the Civil Rights Attorney's Fees Awards Act of 1976 Source Book: Legislative History, Texts, and Other Documents. 94 Cong. 2d. Sess. (1976). (Prepared by the Subcommittee on Constitutional Rights of the Committee of the Judiciary United States Senate and collecting the Senate and House reports and the proceedings and debates of both Houses.)(Available in the Library of Congress.)(Hereinafter referred to as Source Book.)

[4]To the extent petitioner urges the Court to disregard statutory language in favor of general policy considerations, their arguments must be

(FOOTNOTE CONTINUED ON NEXT PAGE)

1. Here, the statutory language is plain. Congress has provided for witness fees as taxable costs in the modern version of the Fee Act of 1853:

> A judge or clerk of any court of the United States may tax as costs the following....
>
> (3) Fees and disbursements for printing and witnesses....

(FOOTNOTE CONTINUED)

rejected. The Court has recently cautioned against ignoring the plain language of a statute on these grounds:

> [W]e decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

Mansell v. Mansell, No. 87-201, slip op. at 13 (U.S. May 30, 1989).

> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920.

The costs permitted for witnesses, other than court-appointed experts, are further limited by statute:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . should be paid the fees and allowances provided by this section.
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

28 U.S.C. § 1821(a)(1),(b). Rule 54(d) of the Federal Rules of Civil Procedure provides in turn for the taxation of costs in favor of the prevailing party,

"unless the court otherwise directs." Petitioner concedes, as it must, that the "plain meaning" of 42 U.S.C. § 1988 provides only for the shifting of "a reasonable attorney's fee" as part of the costs allowed a successful plaintiff. The statute makes no mention of witness fees. Thus, to the extent costs associated with witnesses are allowed at all, they are limited, except in the case of court appointed experts, to an attendance fee of thirty dollars per day.

2. The Court recently addressed the effect of these two statutes in Crawford. In that case, prevailing plaintiffs sought recovery of fees paid expert witnesses in an antitrust case. The Court rejected the argument that Rule 54(d) allowed the district court discretion to award witness fees in excess of the statutory limits:

> We think that it is clear that in §§ 1920 and 1821, Congress comprehensively addressed the taxation of fees for litigants' witnesses. This conclusion is all the more compelling when we consider that § 1920(6) allows the taxation as a cost of the compensation of court-appointed expert witnesses. There is no provision that sets a limit on the compensation for court-appointed expert witnesses in the way that § 1821 sets a limit for litigants' witnesses. It is therefore clear that when Congress meant to set a limit on fees, it knew how to do so. We think that the inescapable effect of these sections in combination is that a federal court may tax expert witness fees in excess of the $30-per-day limit set out in § 1821 only when the witness is court-appointed.[5]

482 U.S. at 442.

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[5]The Court noted that petitioners' argument had been rejected by the Court years before in Henkel v. Chicago, S.P., M. & O.R. Co., 284 U.S. 444 (1932). 482 U.S. at 443.

The Court observed that its holding in Crawford conforms to its interpretation of the Fee Act in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). In Alyeska, the Court ruled that courts were not empowered to award counsel fees to a prevailing party, because counsel fees were not listed as a cost taxable under the Fee Act. The Court in Crawford recognized that Congress had responded to Alyeska by broadening the availability of attorneys fees under 42 U.S.C. § 1988, but noted that "it has not otherwise 'retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors.'" 482 U.S. at 444, quoting Alyeska, 421 U.S. at 260. The Court went on to say that:

> We think that, as in Alyeska, Congress has made its intent plain in its detailed treatment of witness fees. We will not lightly infer that Congress has repealed §§ 1920 & 1821, either through Rule 54(d) or any other provision not referring explicitly to witness fees. As always, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976), quoting Morton v. Mancari, 417 U.S. 535, 550-551 (1974) (emphasis added).

482 U.S. at 444-445.

While it is certainly true that the Court in Crawford did not decide the precise issue now before the Court -- availability of expert fees under 42 U.S.C. § 1988 -- it is also true that the Crawford decision goes a long way toward answering that question. The

Court has acknowledged that the limitations of the Fee Act are generally applicable to expert witnesses and has said in the plainest terms that it will respect those limitations, absent explicit statutory direction to the contrary. Because the language of 42 U.S.C. § 1988 refers only in general terms to the allowance of attorneys fees as costs, and is silent as to witness fees, it does not provide the clear direction the Court has said it will require to modify the Fee Act.

B. CONGRESS DID NOT INTEND WITNESS FEES TO BE COVERED BY 42 U.S.C. § 1988.

Petitioner asks that the Court look beyond the plain language of 42 U.S.C. § 1988, which does not mention expert witness fees, to find a congressional intent that they be included

anyway within the statute's scope. However, the historical context of the enactment of the "attorney's fee" amendment to § 1988, the debate surrounding it, and a comparison with other fee shifting statutes all demonstrate that Congress' attention was focused on shifting the cost of counsel fees in civil rights litigation and not on compensation for expert witnesses.

1. The amendment was passed in direct response to the Court's decision in Alyeska. In that case, the Court held that federal courts could not award attorneys' fees as a cost to prevailing parties unless the award was specifically authorized by statute.

> Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorneys' fees; but neither has it retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors. Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted.

421 U.S. at 260 (footnote omitted).

The Court stated that "the approach taken by Congress to [the issue of attorney's fees] has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees...." Alyeska, 421 U.S. at 269. The Court also stated that Congress "has not changed the general statutory rule that allowances for counsel fees are limited to the sums specified in the costs statute." 421 U.S. at 255. The Court further noted that there is "a well-established principle . . . that no 'change is to be presumed unless clearly expressed.'" 421 U.S. at 256, n.29 (citation omitted).

The Court found that Congress has made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes . . . [which] differ considerably among themselves.... [And that] it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. at 260-262.

In response to Alyeska, Congress amended 42 U.S.C. § 1988, to explicitly provide that in certain civil rights cases, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." By its plain terms, the statute addresses only the shifting of attorneys' fees as

part of the costs. The statute is silent as to expert witness' fees despite the fact that the Fee Act of 1853, discussed in Alyeska, contains an explicit limitation on witness fees allowable as costs, and despite the decision of Henkel v. Chicago, S.P., M. & O.R. Co., 284 U.S. 444 (1932), which held that these limitations were fully applicable to costs generated by expert witnesses. Under these circumstances, Congress should not be presumed to have meant more than it said, and "a reasonable attorney's fee" should not be distorted to include expert witness' fees.

2. Petitioner suggests that the phrase "'reasonable attorney's fees' is a 'shorthand expression' for what it reasonably costs to prevail, including expert fees." Pet. Brief at 23. Petitioner draws support for its position

from Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989), a case in which the court refused to read either 42 U.S.C. § 1988 or the Crawford decision literally and consequently did conclude that "reasonable attorney's fees" was a shorthand expression which included witness fees. The Friedrich decision misreads Crawford and does not square with Congress' specific treatment of expert fees in other fee shifting statutes -- some enacted or debated at the same time as the amendment to § 1988.[6] For example, about a week

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[6] Petitioner's claim that "Congress specifically state[d] its intent that the term 'reasonable attorneys' fees' when used in fee shifting statutes, includes fees of experts", Pet. brief at 18, is incorrect, misleading and wholly unsupportable from the authority petitioner cites--H.R. Conf. Rep. No. 687, 99th Cong., 2d Sess. 5, reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1808. That report states:

(FOOTNOTE CONTINUED ON NEXT PAGE)

before it enacted the amendments to § 1988, Congress passed the Toxic Substances Act, Pub.L. 94-469, 90 Stat. 2041, Oct. 11, 1976, 15 U.S.C. § 2601, et seq. That statute provides that "The

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(FOOTNOTE CONTINUED

> The conferees intend that the term "attorneys' fees as part of the costs" include reasonable expenses and fees of expert witnesses and reasonable costs of expert witnesses and reasonable costs of any test or evaluation which is found to be necessary . . . as well as the traditional costs incurred in the course of litigating a case.

This statement only applied to the bill under consideration, the Handicapped Children's Protection Act of 1986, P.L. 99-372, 100 Stat. 796, 20 U.S.C. § 1415 (e)(4)(B). The amendments to § 1988 were enacted in October of 1976. What a Congressional Conference committee said about a different statute ten years after it amended § 1988 cannot be taken as an expression of what Congress intended earlier. Firestone Tire and Rubber Co. v. Bruch, No. 87-1054 (U.S. Feb. 21, 1989).

court may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate." 15 U.S.C. § 2619(c)(2), Pub.L. 94-469, § 20.[7] Similarly, Congress enacted in 1980 amendments to the statutory provision for costs and fees taxable in civil actions brought by or against the United States under the Equal Access to Justice Act. 28 U.S.C. § 2412. These amendments were debated at the same time

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[7]Senator Kennedy, one of the principle sponsors of the amendment to § 1988, referred to the Toxic Substances Act and its fee shifting provisions during debate on the amendments to § 1988. Source Book at 198. Senator Tunney, who introduced the amendment to § 1988, was one of the managers, a member of the conference committee and a member of the Commerce Committee (which reported out the Toxic Substance bill) for the Toxic Substances Act. 1976 U.S. Code & Admin. News at 4522 and 4543.

as the amendments to § 1988, and expressly define taxable "reasonable fees and expenses of attorneys" as including "expenses of experts witnesses." 28 U.S.C. § 2412(d)(1)(A), (d)(2)(A).[8] The Clean Air Act, 42 U.S.C. § 7604(d), passed in 1976, authorizes a court to award to any party costs of litigation "including reasonable attorney's fees and expert witness fees." (Emphasis added.) These are not the only examples. In at least 30 provisions in 26 separate statutes, Congress has chosen

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[8]28 U.S.C. § 2412(d) was amended effective October 21, 1980 by the 96th Congress. The Amendment, however, was first proposed by Senator Helms as amendment No. 470 to S.2278, the bill which amended 42 U.S.C. § 1988. Amendment 470 was debated by the Senate during its debate on S.2278 and expresly called for reasonable expenses of witnesses and expert witnesses. Source Book at 34-45.

to specify that under certain statutorily-defined circumstances litigants (often, however, only prevailing plaintiffs) may recover expert witness fees in addition to the costs normally recoverable in a civil action and in addition to attorneys' fees.[9]

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[9]See Administrative Procedure Act, 5 U.S.C. § 504(b)(1)(A); Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), 2072(a), 2073; Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(1)(C), (d)(3); National Historic Preservation Act Amendments of 1980, 16 U.S.C. § 470w-4; Endangered Species Act of 1973; 16 U.S.C. § 1540(g)(4); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a)(1), (b)(2); Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. § 7430(a), (c)(1)(A)(ii); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1734(a)(4); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928(d); Federal Water Pollution Control

(FOOTNOTE CONTINUED ON NEXT PAGE)

Thus, it is simply not true that Congress regards the phrase "reasonable attorney's fee" as a term of art that encompasses expert witness costs -- still less is it a shorthand phrase for "all expenses of litigation."

(FOOTNOTE CONTINUED)

Act, 33 U.S.C. § 1365(d); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4); Deepwater Ports Act of 1974, 33 U.S.C. § 1515(d); Act to Prevent Pollution from Ships, 33 U.S.C. § 1910(d); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Noise Control Act of 1972, 42 U.S.C. § 4911(d); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e); Clean Air Act Amendments of 1977, 42 U.S.C. § 7622(b)(2)(B), (e)(2); Power Plant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d); Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d); Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(a)(5); Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686(e); Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 2014(e).

3. The pre-Alyeska cases cited in the Senate Report on the proposed amendment do not suggest, as petitioner implies, see Pet. brief at 20, that Congress was led to believe an award of attorney's fees would include expert fees. The Senate Report cited Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) as containing the "appropriate standards" for computing counsel fees and Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlotte Mecklenberg Board of Education, 66 F.R.D. 483 (W.D. N.C. 1975) as cases which "correctly applied" those standards. Senate Report at 6, Source Book at 12. The report stated that "In computing the fee, counsel for the prevailing parties should be paid, as is

traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on the matter.'" Id. These cases were cited to Congress for the purpose of illustrating when an award of attorney's fees should be made and to whom but not for the proposition that experts' costs are to be a component of an attorney's fee.[10]

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[10]None of the 12 factors listed in Johnson has a thing to do with expert's fees. The fact that they were awarded in Davis v. County of Los Angeles, supra, is of little moment because the charge for expert witness fees was not challenged by the defendants and Davis only "permitted a fee award to counsel in a public interest firm which otherwise would have been entitled to no fee." Blanchard v. Bergeron, No. 87-1485, slip op. at 5 (U.S. Feb. 21, 1989). Similarly, in Swann, there was no objection by the defendants to the "expenses" claimed, and awarded.

Congress certainly did recognize that there was a difference between attorney's fees and expert witness' fees, and knew how to provide language specific enough to encompass expert witness' fees when it wanted to. That it did not do so in the amendment to § 1988 can only mean that Congress did not mean for expert's fees to be covered under § 1988. In this amendment, Congress addressed only the problem at hand -- Alyeska -- and provided only provision for the shifting of reasonable attorney's fees.[11] Not only is there no explicit reference in the statute for the shifting of expert witness' fees --

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[11]That Congress was not concerned with expert's fees is borne out by the debates on the amendments, which do not even mention expert costs. Source Book passim.

as required by the Court in Crawford -- there is no explicit reference to expert witness' fees in the legislative history or in the debates, nor is there any other basis for concluding that Congress assumed that expert's fees would be included without specific reference.

4. Petitioner argues that, despite Congress' failure to mention expert witness' fees in § 1988, the intent of the statute will be thwarted if the Court does not read the statute to allow for fees anyway. The argument runs that civil rights plaintiffs will be discouraged from filing lawsuits or will be unable to prosecute them successfully because there will be no mechanism for them to recover expert witness' fees at the conclusion of the litigation, if they are successful. In the first place, it is not for the Court

to rewrite clear statutory language on the basis of broad policy considerations. See Badaracco v. C.I.R., 464 U.S. 386, 398 (1984)("Courts are not authorized to rewrite a statute because they might deem its effect susceptible of improvement."); T.V.A. v. Hill, 437 U.S. 153, 194-195 (1978)("We do not sit as a committee of review, nor are we vested with the power of veto." The Supreme Court may not "pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'") Secondly, giving effect to the statute as written will not necessarily have the effect petitioner claims.

The Fee Act draws a distinction between the thirty dollar a day witness fee authorized by statute, and "compensation" for court appointed experts:

> A judge or clerk of any court of the United States may tax as costs the following .... (6) Compensation of court appointed experts....

28 U.S.C. § 1920.[12]

Rule 706 of the Federal Rules of Evidence permits the trial court, upon request of any party or on its own volition, to issue an order to show cause why expert witnesses should not be appointed, and to invite the parties to submit nominations. Court appointed experts "are entitled to reasonable compensation in whatever sum the court may allow . . . [which] shall be paid by the parties in such proportion . . . as the court directs, and thereafter charged

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[12]Congress obviously used the word "compensation to distinguish this payment from the "witness fee" authorized by § 1920(3) and limited in amount by § 1821.

in like manner as other costs." Fed.R. Evid. 706(b).

Court appointment of a witness nominated by one of the parties can and has been used to establish a statutory basis for later taxation of that witness's compensation as costs. See United States Marshal's Service v. Means, 741 F.2d 1053, 1057-58 (8th Cir. 1984). This is also done, on occasion, under the rubric of the Court's "inherent power" to tax expert witness fees through prior approval. See Gradmann & Holler GMBH v. Continental Lines, S.A., 679 F.2d 272, 274-75 (1st Cir. 1982); Cagle v. Cox, 87 F.R.D. 467, 471-72 (E.D. Va. 1980); Pizzarro-de Ramirex v. Grecomar Shipping Agency, 82 F.R.D. 327 (D.P.R. 1976). See also 11 Moore's Federal Practice § 706.01[3.-1]

p.VII-78 ("The inherent power of a trial judge to appoint an expert of this own choosing is virtually unquestioned.")

Taken together, Rule 706 and 28 U.S.C. § 1920(6) provide a vehicle for a needy plaintiff to apply to the court for appointment of an expert and for the shifting of the cost of a court appointed expert to the losing party. This fore-closes petitioner's argument that worthy and impecunious litigants will be denied access to necessary experts unless § 1988 is given the expansive reading they suggest. Reading the statutes literally, experts will be available when needed, but the court will be able to evaluate whether their services are necessary and will be in a postion to control their use.

C. MISSOURI v. JENKINS DOES NOT SUPPORT THE PETITIONER

Petitioner argues that the Court's recent decision in Missouri v. Jenkins, No. 88-64 (U.S. June 19, 1989) controls and requires reversal. Petitioner is wrong. In Jenkins, the Court considered the appropriate rate to be applied under 42 U.S.C. § 1988 to work done by paralegals and law clerks employed by counsel. The parties had agreed that they could be compensated under the statute and disagreed only on whether they should be compensated at cost to the law firm or at the hourly rate billed the client. In concluding that the hourly billing rate was appropriate, the Court said that a reasonable attorney's fee "must take into account the work not only of attorneys, but also

of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit." slip op. at 11. The Court in Jenkins did no more than to allow a lawyer to bill an adversary under § 1988 for the services of the lawyer's employees which would normally be billed separately to a private client. This is a far cry from the result urged here. It is one thing to say that the phrase "reasonable attorney's fee" may include compensation for a lawyer's paralegal employees and quite another to say that it may include compensation for non-legal witnesses, not affiliated with the lawyer, whose costs are governed by

another, more specific statute.[13] To give the words of § 1988 so expansive a meaning is to give them no meaning at all.

It is Crawford, not Jenkins, that controls this case. Applying Crawford, expert witness' fees may be taxed as costs only in accordance with the limitations of 28 U.S.C. §§ 1920 & 1821 unless some other statute or contract, explicitly referring to witness fees, provides otherwise. Section 1988 makes no provision for the

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[13]Courts have recognized, in addition, that the purpose of expert testimony is not to advocate, but to assist the fact finder in deciding issues of fact. See, e.g., United States v. R.J. Reynolds Tobacco Co., 416 F.Supp. 313, 315 (D.N.J. 1976); United States v. 364.82 Acres of Land, 38 F.R.D. 411, 416 (N.D. Cal. 1965).

compensation of expert witnesses, and the judgment of the Court of Appeals should therefore be affirmed.